No. 5979

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEALY TIBBITTS CONSTRUCTION COMPANY, a corporation,

Appellant,

vs.

SHELL OIL COMPANY, a corporation, charterer and operator of the Steam Tug FALCON and SHELL UNION OIL CORPORATION, a corporation, principal stockholder of Shell Oil Company,

Appellees.

APPELLANT'S BRIEF

On Appeal from Order Denying Petition to Set Aside Injunction Against a Common Law Suit in the Superior Court of the City and County of San Francisco

and

PETITION FOR ADVANCING HEARING.

(page 31)

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Parker Printing Company, 523 Clay Street, San Francisco

Summary of the Argument.

Index to Cases, Statutes and Rules.

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STATEMENT OF CASE.

This is an appeal brought by the Healy Tibbitts Construction Company from an order of the District Court below refusing to modify an injunction restraining it from bringing to issue or trial a suit in the State courts of California against the barge Martinez and her owners, the Shell Oil Company and Shell Union Oil Corporation, appellees, for faults specifically charged against the Martinez, her officers and crew. The faults are charged to have caused a collision with Pier 45 belonging to the Healy Company and situated on the north San Francisco waterfront. The damages claimed are $50,000.

The Martinez was a large seagoing tanker barge, navigated by her own officers and crew, as she trailed behind a small tug, the Falcon. Her own officers steered her with a steam powered steering gear. The faults specifically charged against her appear in the Apostles at pages 44 and 45,* as follows:

(a) The negligent dispatching by the shore management of the Shell Company of the said barge for her voyage through the space between Pier 45 and the ferry slip in the then condition of the wind and tide; (b) the negligent steering of the barge Martinez prior to the emergence of the ferry, as alleged in the petition for limitation herein, whereby said barge Martinez was not steered behind her tug but was steered too far to the easterly and too near to Pier 45, whether or not interfered with by the ferry; (c) that after the emergence of the

*The numerals in parentheses in the text are of the pages in the Apostles to which reference is made.

ferry the barge was steered negligently in this, that she failed to use her remaining headway to steer her to bring her parallel to the pier and thereby minimize the damage, her failure so to do causing her to hit a much sharper dragging blow with her after starboard corner against a succession of piles, and that each of the above faults proximately contributed to the collision.

On the 25th day of March, 1929, the Shell Oil Company and Shell Union Oil Corporation, the former's principal stockholder, filed in the District Court below a petition for limitation of or exoneration from liability for the damages inflicted on Pier 45 by the Martinez. The title of the proceeding below is as follows:

> "In the Matter of the Petition of SHELL OIL COMPANY, a corporation, **charterer and operator of the Steam Tug Falcon,** and SHELL UNION OIL COMPANY, a corporation, principal stockholder of SHELL OIL COMPANY, for exoneration from or limitation of liability. } No. 19972 L."

Although so petitioning only as owners of the small tug Falcon, the petition sought limitation of and exoneration from liability for the damage inflicted by the large seagoing barge. The petition for limitation, as amended, admitted that the power steered barge Martinez was navigated by her own officers and crew while trailing on a hawser behind the tug. The petition also alleged *both* the barge and the tug to be innocent of wrong doing and attributed the collision to the fault of a ferryboat, which

is alleged to have crossed ahead and impeded the navigation of the two vessels and caused the collision of the Martinez with the pier.

The petition also shows but one claim, that of the Healy Tibbitts Construction Company. It alleged a threatened suit by the Healy Company of upwards of $40,000 for the damages inflicted by the Martinez, which, having been caused to collide with a fixed land structure, was presumptively in fault. All the authorities agree that this presumption casts the burden of proof upon a trailing tow navigated behind a tug, to show that it was not the tow's fault which caused a collision with a moored vessel or a dock.

The Virginia Ehrman, 97 U. S. 309, at 315; 24 L. Ed. 890, 892-93;

Wilmington Ry. Bridge Co. v. Franco Ottoman S. S. Co., (C. C. A. 4th) 259 Fed. 166, 168;

The Invertrossachs, (C. C. A. 3rd) 59 Fed. 194, 197;

Albert N. Hughes, (C. C. A. 3rd) 92 Fed. 525 at 528.

In addition to the presumption of fault in the Martinez, are the specific charges of fault in the Healy Company's verified and uncontradicted petition to modify the restraining order (44).

Consistent with the character in which they sued, i. e., as owners of the Falcon only, the Shell Companies offered a stipulation for $3,000, the value of the allegedly innocent Falcon, and none for the value of the presumptively guilty Martinez, also specifically charged with her own separate faults of navigation. The uncontradicted affidavit (36, Par. VIII) proved and the Shell brief below admitted

that the value of the Martinez was substantially in excess of the amount of the damages to the pier.

Despite the fact that the Healy suit constituted the only claim against the Martinez and that the Martinez' value exceeded the claim, and further that the Shell Companies did not offer to surrender the Martinez or her value, they sought an injunction restraining the Healy Company from suing in any forum of its own choice the Martinez or the appellees, as her owners, on charges of her faults. Such an injunction was ordered issued and was served on the 25th day of May, 1929. At that time no suit had in fact been filed in the State court.

A citation was served and published and, on the return day, no other claims being filed (47), default was entered against all persons other than the Healy Company (47). Thus both by the allegations of the Shell petition and the adjudication of the court below, this is a single claim proceeding.

The Healy Company filed a verified petition to modify the injunction so as to permit the prosecution of its suit, based on its right under the California Code of Civil Procedure, Sections 813 et seq., against the Martinez and its rights against her owners for her faults leading to the collision. Such a suit is *quasi in rem* against the vessel and *in personam* against the owners. The petition for modification disclosed that the lien on the Martinez, created by the state law, was not cognizable in admiralty and that the injunction, in effect, destroyed that lien. At the same time it deprieved the Healy Company of its right to a jury trial and to the remedies of the State court,

such as a verdict by nine jurors, etc., and of its right to a joint trial in a single suit of the responsible officers, crew and owners of the Martinez, and of the ferry and the owners of the ferry.

The petition for modification of the injunction was argued and briefed and submitted on May 23rd. On October 19, 1929, it was denied without opinion (51).

It also appears in the Apostles that the District Court, acting under the authority declared in

In re Oceanic Steam Navigation Co., (C. C. A. 2nd) 204 Fed. 260,

and the stipulation of proctors, modified the injunction to the extent of permitting the *filing* of a suit *quasi in rem* against the Martinez and her owners in the Superior Court of the City and County of San Francisco, State of California, and the taking of such depositions as are allowed by the State laws. This modification of the restraining order was made to enable the Healy Company to file its suit against the Martinez and her owners within the year from the time the cause of action accrued allowed by C. C. P. Sec. 813. It provided that neither of the Shell Companies should be required to plead to or answer any complaint or other pleading filed in the suit. The continuance of the restraining order destroys the enforcement of the $55,000 bond given in that suit and hence destroys the bond. The permission to take testimony in the State court is of no value because the trial at which they would be used is enjoined.

It is but fair to our opponents, although it does not appear in the record, to state that such a suit for $50,000

has been brought against the Martinez and her owners in the Superior Court of the City and County of San Francisco and that the lien of the Martinez has been perfected by seizure, and a bond in the sum of $55,000 filed with the California State court for the release of the Martinez. That suit relies not only on the fault of the Martinez, her master and crew, but is a suit against the master of the Martinez *in personam* for his faults, and the master of the tug Falcon for his faults, and against the Golden Gate ferry boat for her separate faults and against the owner of the Golden Gate ferry boat for alleged faults of the ferry.

The right of the Healy Company against the barge Martinez for her torts, created by the Code of Civil Procedure, Sec. 813, is based upon the following language in that code:

> "All steamers, vessels and *boats are liable* * * * (6) For injuries committed by them to persons or property in this state."

As in admiralty, the boat is the primary thing liable, for, if the owner is absent from the State, the jurisdiction to seize and sell her is obtained by serving the master of the vessel and attaching her. Such an attachment at common law for a claim in tort is unique. It has been called by the California Supreme Court a suit *"quasi in rem"* (*Olson v. Birch,* 133 Cal. 479, 483). Where, as here, the property injured by the boat is a land structure, admiralty has no jurisdiction of the suit. However, its essential identity with a suit *in rem* in admiralty is described by Chief Justice Holmes (now Mr. Justice Holmes) in *Tyler*

v. Judges of Court, etc., 55 N. E. (Mass.), 812, 814, (2nd col.).

The effect of the injunction as it now stands, is to prevent the litigation of the claim of the lien of $50,000 upon the Martinez and against the owners for her faults. So far as these claims are concerned the Healy Company is enjoined from bringing the suit to issue and hence to trial.

The Healy Company is now, in effect, restrained as if the injunction had been issued *after* the State suit had been filed.

The District Court is now ready to proceed to hear and determine in the separate limitation proceeding the issues, the trial of which it has enjoined in the forum chosen by the Healy Company, the Superior Court of the city and county of San Francisco.

I.

The two methods of obtaining limitation of liability: (a) by the owners' answer in the suit in the forum of the choice of the injured claimant: (b) in a separate limitation proceeding where, after the surrender of the value of the charged vessel, the forum chosen by the injured claimant is ousted of jurisdiction to proceed.

The owner of a vessel against whom claims are made because of her faults, has his choice of two methods of securing the limitation of liability created by the acts of Congress. The one method is simply to answer the complaint or libel of the persons claiming damage, in the forum chosen by that claimant, setting up the right to

limit. The other method is by instituting a separate and extraordinary proceeding for limitation of liability where, upon satisfying certain prerequisites created by the statutes and rules of court, the jurisdiction of the forum chosen by the damage claimant is ousted.

Our Supreme Court has long since decided that the ship owner claiming limitation may avail himself of either of these methods. If he accepts the forum chosen by the claimant, his surrender of the value of the vessel ultimately found to be in fault comes at the end of the litigation. It is not a prerequisite to the right to set up the defense. This was squarely held in

> *National Steam Navigation Co. v. Dyer,* 105 U. S. 24, at 34, 26 L. Ed. 1001, at 1004,

where the court said:

> "But it is objected that they did not follow the statute, by giving up and conveying to a trustee, the strippings of the wreck and the pending freight. It is sufficient to say, that the law does not require this. It contains two distinct and independent provisions on the subject. One is, that the ship owners shall be liable only to the value of the ship and freight; the other is, that they may be discharged altogether by surrendering the ship and freight. If they failed to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief. The primary enactment, in section 4283, R. S., is, that the liability of the owner for any loss or damage without his privity or knowledge, shall, in no case, exceed the amount or value of his interest in the vessel and her freight, then pending. Two modes for carrying out this law are then prescribed, one in section 4284, and the other in section 4285. By section 4284, a pro rata

recovery against the ship owner is given to the various parties injured 'in proportion to their respective losses'; and it is added 'For that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto.'

The other mode of attaining the benefit of the law is prescribed by section 4285, which declared, that 'it shall be deemed a sufficient compliance on the part of such owner, with the requirements of this title, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, etc., from and after which transfer all claims and proceedings against the owner shall cease.' This last proceeding the respondents did not see fit to adopt; but that does not deprive them of the benefit of the preceding section."

Nat. Steam Nav. Co. v. Dyer, 105 U. S. 24, at 34; 26 L. Ed. 1001, at 1004-1005.

As held in this case, where the ship owner seeks a limitation by answer, in the common law or other forum chosen by the claimant, there would have to be no surrender of the value of the vessel until after the trial had determined which of the various vessels involved was the offending instrument. In fact the word "surrender" though often used, does not properly describe what happens. There is merely a final decree of judgment *in personam* for the limited amount. There are involved none of the costs of the extraordinary separate limitation proceeding and none of the duplications of trial and procedure which is likely to arise in the event that the petition for separate limita-

tion be denied. This simple method of procedure has been repeatedly followed and the duty of the court has been recently described by the Supreme Court in the cases of

Liverpool, Brazil, etc. Navigation Co. v. Brooklyn, etc. Terminal, 251 U. S. 48; 64 L. Ed. 130, and *Sacramento Navigation Co. v. Salz,* 273 U. S. 326; 71 L. Ed. 663.

In such cases there is no attempt to oust the forum chosen by the damage claimant. The owner offers his plea for a limitation in the suit in the claimant's forum. In such cases it is decided *at the end of the litigation* which of the several ships involved was the "offending vessel" and her value alone is required to be surrendered after the issue of liability is determined.

However, this simple and inexpensive method of procuring limitation did not appeal to the Shell Companies. They feared the trial of their case before a jury in the State court in a procedure where nine jurors may render a verdict.

So, the Shell Companies determined to oust the forum chosen by the Healy Company and to bring the single Healy claim into admiralty, where the claimant would be deprived of its jury and state remedies through the exercise of the District Court's extraordinary power of injunction.

The congressional statutes allowing the limitation of liability, Revised Statutes 4283 to 4285 inclusive (now 46 U. S. C. A. sections 183 to 185), exact as a price or consideration for the granting of this extraordinary power

to oust the state or other courts of their jurisdiction, the surrender of the vessel charged with the offense.

This case more than any other illustrates the extraordinary character of the separate proceeding to limit liability. Admiralty has no jurisdiction whatsoever over the claims for injury to Pier 45, a land structure. The Healy Company could not bring its suit in admiralty against any one of the three vessels involved or against any of the persons owning or managing these vessels. The Healy Company is not only entitled to its common law forum, with its jury, but it could bring its suit in none other than a common law court.

The Panoil, 266 U. S. 433, 69 L. Ed. 366.

By virtue of the extraordinary jurisdiction created in the limitation proceedings such an exclusively common law claim may be brought into an admiralty court where the case is heard without a jury.

Richardson v. Harmon, 222 U. S. 96, 56 L. Ed. 110.

But the jurisdiction in this extraordinary proceeding is never to be presumed. The Federal courts jealously protect the common law courts. As was said by this Circuit Court of Appeals in a limitation proceeding,

> "The object of the acts of Congress for the limitation of liability applies only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress *to oust the jurisdiction of other courts.* * * * It was for the petitioner to set forth facts showing the *peculiar and exclusive* jurisdiction of the court of admiralty. This it has failed to do."
>
> *Shipowners & Merchants Tugboat Co. v. Hammond Lumber Co.,* 218 Fed. 161, at 165.

In *The Aquitania,* (1927 C. C. A. 2nd) 20 Fed. 2nd 457, the court said:

> "The statute is intended to limit the liability of the shipowner, but not arbitrarily to give him a *particular forum.*" (p. 458, citing *The Tug No. 16,* ~~supra~~.)

In the succeeding chapters of this brief we will show that the Shell Companies have not paid this price of the surrender of the Martinez, charged in the State Court with fault. We will show that the whole proceeding, in which the United States District Court enjoined the prosecution of the suit in the Superior Court of the City and County of San Francisco, was without jurisdiction either for the injunction issued or to take any step toward limitation of or exoneration from liability for the fault of the Martinez.

II.

When a vessel or the owner thereof is sued or about to be sued because of a claim of fault against her, such owner can maintain a separate and original limitation and exoneration proceeding, only by the giving of a stipulation for the amount or value of his interest in such vessel or by the transfer of his interest in such vessel to a trustee.

It is only upon compliance with such prerequisites that the court will grant a restraining order restraining the further prosecution of suits against the owner in respect to any such claim.

The record in this case shows that the large power steered barge Martinez collided with Pier 45 and, as a result of the collision, damages amounting to $50,000 are claimed against her and her owners. The collision is specifically charged as caused by the negligent steering

of the Martinez by her own officers and crew. Apart from this there is a presumption, disputable to be sure, that she was in fault for the collision.

The existence of this *claim* against the Martinez and her owners is the basic factor in this litigation. It is true that a State court suit has been begun upon the claim in which an undertaking for $55,000 has been given and the owners have been made defendants. The suit, however, is merely making certain the existence of the claim.

The right of the owners to limit liability for this claim rests upon Sections 4283 to 4285 of the Revised Statutes. These statutes have been construed by the Supreme Court in what is now Admiralty Rule 51. The title of this chapter of our brief contains the exact phraseology which the Supreme Court uses in that rule in construing the limitation statutes. The pertinent portions of that rule are as follows:

> "U. S. Sup. Ct. Ad. Rule 51.
>
> LIMITATION OF LIABILITY—HOW CLAIMED.
>
> When any ship or vessel *shall be libeled*, or the owner or owners *thereof* shall be sued * * * for any loss, damage or injury by collision * * * and he or they desire to claim the benefit of limitation of liability provided for * * * in Sections 4283 to 4285 of the Revised Statutes, * * * the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of *said owner* or owners, respectively, in *such ship or vessel*, and her

> freight, for the voyage, shall make an order for * * * the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment *thereof* into court with interest at the rate of six per cent per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the *said* owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of *his or their interest* in *such* vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall * * * on the application of the said owner or owners, make an order to restrain the *further* prosecution of all and any suit or suits against *said* owner or owners in respect to any *such* claim or claims."

The phrases in the rule are subject to but one interpretation. The remedy of a separate and original limitation proceeding is created to enjoin suits in other forums, commenced against a ship or vessel or the "owner or owners *thereof*" for any injury by collision. In order to obtain this benefit of the statute there must be an appraisement of the interest of the "*said* owner or owners respectively in *such* ship or vessel," that is, the vessel *then charged* with fault, not some other vessel, whether alleged innocent or guilty by the petitioner for limitation. The owners must give a stipulation for the appraised amount of the vessel so sued or of which the owners "thereof" are sued. Or, if the owners do not care to give a stipulation, they shall transfer "their interest in *such* vessel" to a trustee.

After one or the other of these two jurisdictional prerequisites have been satisfied, the court shall make an order to restrain the "further" prosecution of any and all

suits against them "in respect of any *such* claim or claims."

It is thus clear that the restraining order *precedes* any adjudication of the claim or claims against the vessel or the owners "thereof." Since the surrender of "such vessel" or her value precedes the injunction, it is apparent that it is the unlitigated and unliquidated claim against "such vessel" which determines the vessel to be surrendered or stipulated for as the *res* in the limitation proceedings.

The same jurisdictional prerequisite is required if exoneration in addition to limitation is sought by the ship owner. Supreme Court Admiralty, Rule 53, provides that the same surrender is required before proceeding to hear and determine a claim for exoneration, as in Rule 51 for limitation.

> "53. Defense to Claims in Limited Liability Procedure.
>
> "In the proceedings aforesaid, the *said* owner or owners shall be at liberty to contest *his* or their *liability,* or the liability of *said ship* or vessel for *said* embezzlement, loss, destruction, *damage* or *injury,* (independently of the limitation of liability claimed under said act), provided he, it or they shall have compiled with the requirements of Rule fifty-one." * * *

In this case the court, without the giving of a stipulation for the value of the Martinez and without her transfer to a trustee, has issued its restraining order restraining the further prosecution of the claims arising from the faults charged against her and her owners.

We submit, that on the face of Rules 51 and 53 themselves, the Supreme Court has so construed the act limiting liability that it discloses that the injunction issued was without the jurisdiction of the District Court.

Even without the interpretation of the statute given by the Supreme Court in its Admiralty Rule 51, the statute itself clearly shows that the vessel to be surrendered is the vessel against which the claim is made, not the vessel against which the claim is thereafter proved.

46 U. S. C. A., Sec. 185, provides that the owner complies with the provisions for obtaining jurisdiction for a separate limitation proceeding which ousts the forum chosen by the claimant.

> "* * * if he shall transfer his interest *in such vessel and freight,* for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person who *may* prove to be legally entitled thereto; from and after which all claims and proceedings against the owner shall cease." (R. S. 4285.)

The statute shows that the claims themselves determine what vessel is to be transferred to the trustee. The trustee holds the vessel "for the person who *may* prove to be legally entitled thereto." That is the claims *may* be proved *in the future,* the trustee holding the vessel until the unproved claim is established. It is the *claim, not the proof,* which determines the *res* to be surrendered. "Such vessel" can only mean the vessel or vessels or the owner thereof against which "claims or proceedings" are urged.

That it is the character of the claims *at the time of filing the petition* and not the subsequent defense to the claims,

which determines the jurisdictional prerequisites for a separate limitation proceeding, has been squarely held by this court in the case of

> *Anderson v. Alaska S. S. Co.,* (C. C. A. 9th) 22 Fed. 2nd. 532, at 534.

In that case the question was, did the claims at the time of filing the petition exceed the value of the vessel belonging to the petitioning owner. If they did not then exceed the amount surrendered to the court there was nothing to limit. The jurisdiction is dependent on the surrender of the vessel involved creating a *res* less than the amount of the claims.

The amount surrendered in that case was upwards of $79,000. When the claims were filed they aggregated only $45,000. There were, however, other claims of over one hundred other persons entitled to the same relief as those filing claims. It was urged against the jurisdiction that the petitioner would have a good defense to these other claims and, when so established, the total amount would be less than the value of the vessel surrendered. Judge Rudkin's opinion goes on to say that whether the defense to these other claims prove to be sound or unsound,

> "the petitioner could not be denied the benefit of the statute, simply because *it might have a defense* of doubtful validity to some of the claims".
>
> *Id.* p. 534.

So, in the case at bar, the Shell Companies should not be granted, in this separate limitation proceeding, an injunction to restrain the State court suit against the Martinez, without the surrender of the Martinez, because the

petitioner "might have" a defense to the claim of $50,000 against her based on the charges of her tort.

The startling thing is that, although the argument was fully briefed below, not a single case was cited in which such an injunction was sustained against a State or other court suit pending or threatened, charging specific fault against the specific vessel concerning which fault the owner was sued or about to be sued.

The reason why no such case was cited is because Rules 51 and 53 construing the limitation act, are so clear in their interpretation that, until the instant litigation, no proctor has had the temerity to press for a contrary construction.

The whole theory of the separate limitation proceeding is based upon jurisdiction acquired of a certain *res,* i. e., the vessel *charged* with wrong doing. As was said by Mr. Chief Justice Taft, speaking of limitation proceedings,

> "The jurisdiction of the admiralty court *attaches in rem* and in personam by reason of the custody of the *res* put by the petitioner into its hands."
>
> *Hartford Accident Co. v. S. P. Co.,* 273 U. S. 207, at 217; 71 L. Ed. 612 at 616.

What this *res* is the Supreme Court has defined in Rule 51, supra. It is the transfer of the vessel *charged with the fault* or the giving of a stipulation for her value.

It is so obvious that it seems like over-stressing the elemental, to say that the jurisdiction must have "attached" before the question of exoneration from or limitation of liability is to be litigated in a separate limitation proceeding. It is clear from Judge Taft's language that

no jurisdiction attaches before the petitioner has put the custody of the *res* into the court's hands. It is only after jurisdiction attaches in this way that the court can proceed to determine the dispute, which in this case is whether the claimants against the vessel and her owners are right in their assertion of the faults of the Martinez, or the owners are right in their denial of the faults and their assertion of her innocence.

In our next chapter we will attempt to analyze the argument made in support of the injunction and to discuss its fallacy.

III.

The mere denial of faults charged against a vessel and her owners does not confer jurisdiction in a separate limitation proceeding or for an injunction restraining a suit based upon such charges of fault and brought in the forum of the claimant's choice.

The petition for limitation denies that the barge Martinez was in fault and also denies that the little tug Falcon, towing her, was in fault. It alleges that a third vessel, a ferryboat, obstructed the course of the Falcon and the Martinez and that because of this obstruction the tug was compelled to stop towing and the Martinez by some method, either her momentum, the wind, or the tide, collided with Pier 45 and occasioned the damage.

As we have pointed out, in addition to our charges of specific negligence in navigating the barge, as distinguished from the tug, there is a rebuttable presumption

that the barge, the moving object which struck the fixed pier, is in fault.

See the *Virginia Ehrman* and other cases cited supra.

On the other hand, there is no such presumption against the tug Falcon. The tug is presumptively innocent as well as alleged by her owners to be innocent, but the tug was of very small value as compared to the presumptively guilty Martinez. The respective values are $3,000 for the Falcon and upwards of $55,000 for the Martinez. In the State court suit they bonded her for $55,000, and, as we have pointed out, the value of the Martinez was so great that it exceeded the total sum claimed for the damages to Pier 45.

Now comes the strange illogic of the procedure of the Shell Companies. They gave a stipulation for $3,000, the value of the allegedly innocent tug, and asked for and obtained an order restraining suits based on charges of fault in the presumptively guilty Martinez.

It is reasonable to suppose that the purpose of this subterfuge was to be able to say to the court below, "Well anyhow you have some sort of a ship in your jurisdiction and, although we tell you she is innocent, you have some sort of a *res* and hence you should enjoin actions against an entirely different vessel, presumptively guilty".

At the argument below it was stated, substantially, "We have denied the guilt of the Martinez of which there is this presumption, but we have given the value of another vessel innocent, to be sure. Now the business of the court is to go ahead and entertain the litigation and, if

we are wrong, the injunction against the State court suit may be dissolved and the litigation be repeated in the State court, where the Healy Company can *again* establish what it has established *here,* namely, that we were mistaken and the vessel presumptively at fault finally proved to be at fault".

But, surely, this is lifting oneself by one's own bootstraps. The right to proceed in the separate limitation litigation at all, arises only upon the surrender of this presumptively guilty vessel. As a matter of fact it arises only upon the surrender of the vessel charged with fault, whether or not there be any presumption regarding her guilt. It is the *claim* of fault, not the proof of fault, that requires the surrender of the charged vessel. No jurisdiction *"attaches"*, to use the language of Judge Taft, until the *res* is given to the court and only *thereafter* can the questions of which vessel was at fault be litigated in a separate limitation proceeding.

When pressed in argument below, the Shell proctors admitted that their case was a desperate one. What made them desperate was the fact that they would have to face a jury in the State court unless they could hide behind the value of the little Falcon and keep the trial against the valuable Martinez out of the State's jurisdiction. If they surrendered the Martinez or gave a stipulation for her value in the limitation proceeding, they would instantly disclose that the value of the *res* exceeded the value of the single claim and the other prerequisite for a separate limitation proceeding, namely, that the

claim should be for more than the *res,* would not be satisfied.

Shipowners and Merchants T. Co. v. Hammond L. Co., (C. C. A. 9) 218 Fed. 161.

The following, we believe, is a fair statement of the absurd results which would follow if the court were to adopt this subterfuge whereby the Falcon's $3,000 value is the basis for enjoining suits against the $55,000 Martinez.

Suppose the steamer Virginian, valued at $10,000,000, is emerging from her dock in the harbor of New York and rams and sinks the steamer Bremen, worth, say, $8,000,000. The Bremen is a fixed object, moored at her pier. The owners of the Bremen libel the Virginian for $8,000,000 and Panama Pacific Steamship Co., the Virginian's owners, give a bond for $8,000,000 and she is released.

The Panama Pacific line then files a limitation proceeding in which they allege that the Virginian was innocent of fault and that the collision was occasioned in this way,—there was a rowboat, not belonging to the Virginian, but to the Panama Pacific line, containing the superintendent of the Virginian's owners, which came suddenly from behind another vessel, across the path of the Virginian. The Virginian's captain, suddenly recognizing the superintendent of the line, *in extremis,* puts over his helm to avoid the rowboat and thereby innocently ran into and sank the Bremen. This is of course denied by the owners of the Bremen.

The Panama Pacific Co. thereupon tenders the value of their rowboat, say $300, and the court accepts jurisdiction

of the limitation proceeding on the receipt of the *res* of a $300 stipulation, and enjoins the $8,000,000 suit against the Virginian. That is to say the $300 bond is sufficient to destroy the $8,000,000 lien on the mere *allegation* of innocence.

Such a happening, though improbable, is not at all impossible. If the allegations are ultimately proved and the captain of the Virginian truly acted *in extremis,* the Virginian is innocent of wrong doing and would be held to be innocent by the court deciding the case on the facts as stated.

Could anyone believe that so absurd a proposition would be offered in a limitation proceeding as that the tender of the $300, the value of the rowboat, would warrant an injunction against the $8,000,000 libel against the Virginian and an ousting of the libel proceeding by the limitation proceeding, simply because of an *allegation* of the above facts in the petition for limitation?

We reiterate that it is the claim against the specific vessel at the time it is made, which determines the *res* which must be placed in the hands of the court. It is not the ultimate proof of the innocence or guilt of the charged vessel which determines the right to enjoin proceedings in other tribunals.

As we have said before, no case has been found, in which it has been held that the surrender of one vessel as a *res* in a limitation proceeding has warranted an injunction against a suit arising from the faults charged against another vessel. The litigant is entitled to the forum of his choice, whether it be in the State court or in admiralty,

until the vessel charged with the fault or its value is given as a *res* to invoke jurisdiction for a separate limitation proceeding.

This is not to say that there are no cases cited in the court below. There were many. They may be grouped in three classes:

(a) Cases where the right to a limitation was set up in the answer. Here were involved no injunctions ousting or restraining the exercise of jurisdiction of the courts chosen by the claimants. In this group were the cases of *Van Eyken v. Erie Ry.,* 117 Fed. 712; *Liverpool etc. Nav. Co. v. Brooklyn Terminal,* 251 U. S. 48; 64 L. Ed. 130; and *Sacramento Navigation Co. v. Salz,* 273 U. S. 326; 71 L. Ed. 663. The courts there held that when the defense is set up in the answer, as allowed first in *National Steam Navigation Co. v. Dyer,* supra, the responsibility of the vessel or of the one of several vessels shall be first determined and the value of only the "offending vessel", so determined, should be expressed and given in satisfaction of the claim or claims.

(b) Limitation proceedings brought after the responsibility was fixed in the State courts in common law cases. In such cases judgments had been entered in the State courts and one or another of the several charged vessels had been found to have committed the offense. Thereafter a separate limitation proceeding was brought and injunction asked against the enforcement of the several judgments. It was held that the question as to which was the offending vessel, having been litigated in the tribunals chosen by the claimants, the decisions in that

litigation were binding in the limitation proceeding, and the value of the vessel so adjudged to be guilty constituted the amount to be surrendered. In this group was the case of *The Begona* II, 259 Fed. 919.

(c) Limitation proceedings enjoining State court suits upon the surrender of the value of certain vessels, it not appearing in the opinions that the other vessels which it was claimed should be surrendered had been charged with any specific faults or wrong doing in the State court or other jurisdiction chosen by the claimant. Such were the cases of *The Erie Lighter 108,* 250 Fed. (D. C.) 493 and 494; *O'Brien Bros.,* (D. C.) 252 Fed. 185.

In these two District Court cases there is nothing to indicate that in the suits filed in the State court, the tort claimed was a tort of the vessel which was not surrendered in the limitation proceeding. They are clearly distinguishable from the case at bar, *and present no discussion of the text of Rule 51 of the Supreme Court, or of Section 4285 of the Revised Statutes.* It does not appear in those cases, to use the language of Rule 51, that the ship sought to be surrendered was the ship which "shall be libeled", or of which the owner "shall be sued" for any "damage or injury by collision", or otherwise. Under no straining of construction can it be said that the court, in those cases, said: "It is true that the suits in the State court assert a tort committed by the vessel which is not surrendered. Nevertheless, although charged with such fault, we will enjoin the suit in the State court without the surrender of that vessel in this limitation proceeding, because there are defensive allegations in the petition

to the allegations of the suit in the State court." However if these two District Court cases were not clearly distinguishable from the case at bar, and could be cited as an authority to the effect that where there is a suit based upon a right *in rem* or *quasi in rem* against a vessel, it can be enjoined without surrender of that vessel, because the owner, in his petition in a separate limitation proceeding, merely alleges a defense to the right *in rem,* they are clearly against the decision of the Circuit Court of Appeals of this Circuit, in

> *Anderson v. Alaska Steamship Company,* (C. C. A. 9th), 22 Fed. (2nd) 532, at 534, cited supra.

In that latter case, it was determined that it is the existence of the claims at the time of filing the petition, and not the defense to the claims, which determines the jurisdiction.

Other cases cited were claimed to show there was no presumption against the trailing barge which we alleged was navigated into Pier 45 and that there was a presumption of fault in the tug. These authorities are cases where the barge was lashed hard alongside the tug and had and could have no participancy in the circumstances leading to the collision.

Such a case is *The Transfer No. 21,* (C. C. A. 2nd) 248 Fed. 459. In that case, it appeared that because the tow, a car float, was without motive power, lashed alongside the tug, and moved by it, that it *could not be* at fault. This was the holding of that court, in the following language:

> "A tow without motive power alongside a tug and moved by it *cannot be* at fault."

Obviously, the *ratio decidendi* of this case is that, if the car float *could* have been at fault and the charge *in rem* were made against her, the prosecution of that charge in the State court would be enjoined only on the surrender of the car float in the limitation proceeding. So, also, in

> *Liverpool, Brazil & River Plate Steam Navigation Company v. Brooklyn Eastern District Terminal,* 251 U. S. 48, 64 Law. Ed. 130.

There, the court considered only the question whether or not innocent vessels must be surrendered because lashed alongside the guilty tug. In the summary of the argument in that case, reported in the Law. Edition, the only question presented by the injured party, the petitioner on *certiorari,* was whether *all* of the vessels in the common venture should be surrendered, *regardless of fault.* The Supreme Court assumes, as did the Circuit Court of Appeals in *Transfer No. 21,* that

> "the moving cause was the respondent's steam tug Intrepid, which was proceeding up the East River, with a car float loaded with railroad cars *lashed to its port side* and on its starboard side a disabled tug, both belonging to the respondent. * * * The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility."
>
> (251 U. S. at 51-52, 64 L. Ed. 130, at 131.)

Mr. Justice Holmes cites with approval, the decisions of other courts holding that the barge lashed alongside *cannot* be responsible, and amongst them the *Transfer No. 21,* cited supra.

Equally significant, Mr. Justice Holmes supports the distinction between a barge lashed alongside and a barge trailing on a hawser steering her course behind the tug, by citing his own prior opinion holding such a trailing barge liable *in rem* for faults committed by her. This was the case of the

Eugene F. Moran, 212 U. S. 468, 474, 475; 53 L. Ed. 600, 603, 604.

The specific faults of the trailing tows in the *Eugene F. Moran* case are set forth in the opinions below:

D. C. 143 Fed. 187; C. C. A. 154 Fed. 41.

There is nothing in the *Liverpool* case which, in the remotest way, indicates that if the car float had been *trailing behind* the tug, and there was a suit *quasi in rem* for negligent steering, supported by a presumption of fault, pending against her in the State court, the Federal court, in a separate limitation proceeding, would have enjoined such suit, without the surrender of the car float, or her value.

That question could not arise in the *Liverpool* case, because, as we have pointed out, that was not a separate limitation proceeding and it was not sought to oust the State court of its jurisdiction. The defense was made in the answer and the question of the vessel to be surrendered arose only after the question "Which was the offending vessel?" had been decided. There was hence no discussion of Admiralty Rule 51 of the Supreme Court and certainly nothing said which impairs the validity of that rule as stating the jurisdictional prerequisites for a separate limitation proceeding.

It is therefore submitted that the mere defensive allegation of want of fault in the presumptively guilty barge Martinez, without the surrender of that vessel or giving a stipulation for her value, does not confer jurisdiction in a separate limitation proceeding, to enjoin a suit in a common law court based on charges of fault against her and brought in the forum of the injured party's choice.

Precedence of the appeal in this Circuit Court of Appeals and Petition to Advance Hearing.

Section 129 of the Judicial Code provides that an appeal to the Circuit Court of Appeals from an order denying an application to dissolve or modify an injunction "shall take precedence in the appellate court." Apart from the statutory right of precedence in this court, the appeal in this case presents cogent reasons for its expeditious hearing and decision. While such an order as that refusing the modification of the injunction is called interlocutory, in this case the decision is final in character.

The sole question presented is the jurisdiction of the District Court to hear and determine *anything* with respect to the charges of fault against the Martinez and her owners. The facts on which the appeal is based are none of them controverted. The appeal presents a pure question of law, namely, can the District Court proceed to do anything with regard to the State court suit until a stipulation in the value of the accused and presumptively guilty Martinez is filed with the court, or the Martinez herself is surrendered to a trustee.

If our contention be correct and her value must be surrendered, it at once appears that there is no jurisdiction for a *limitation* proceeding. The value of the vessel exceeds the single claim and there is nothing to limit.

Shipowners and Merchants T. B. Co. v. Hammond Lumber Co., (C. C. A. 9) 218 Fed. 161.

It is obvious that it is to the great convenience of this court, and the District Court, and the litigants herein, to

decide this underlying question of jurisdiction at this stage of the proceedings. Under the order as it now stands, the limitation proceeding would go forward and come to trial, and all of the evidence be taken on all of the issues presented by the petition at great consumption of the time of a busy court and great expenditure of time and money on the part of the litigants.

The appeal from the limitation trial in the District Court would require the printing of the entire record, including all the evidence, for the Apostles here and at substantial expense.

If the contention made by the appellant be correct, all this would be a waste of time of the court and litigants and of the money expended.

Not only would the time, energy and expense of the District Court proceedings and the appeal here be wasted, but in the two or three years in which the case would be there and here litigated, and certiorari or appeal be sought and disposed of, the witnesses in the State court proceeding may disappear; or if their depositions had to be taken, the litigants would lose their right of having their witnesses appear before the jury. In such time the memory of witnesses grows dim and each month increases the vexation to client and counsel of reconstructing the circumstances of ancient happenings.

Since this is a single claim case, there are no other litigants to be embarrassed while the instant controversy is being determined.

It is, therefore, submitted that both as a matter of statutory right and as a matter of convenience to this

court, the District Court and all the parties, this appeal should be accorded precedence and an early hearing and prays that it be heard at an early date, say December 16, 1929.

CONCLUSION.

Wherefore, appellant submits that the restraining order issued by the District Court, restraining the Healy Tibbitts Construction Company from prosecuting its suit in the Superior Court of the City and County of San Francisco, State of California, against the barge Martinez and the owner thereof for faults of the said barge, was issued without the jurisdiction of the said District Court; and that the said injunction, in so far as it restrains the prosecution of the said suit by the Healy Tibbitts Construction Company for the faults of the Martinez, should be vacated and quashed, and the said Healy Tibbitts Construction Company be permitted to pursue the said litigation without the interference of the said court acting in the said limitation proceeding, and to that end the order appealed from should be reversed.

William Denman,
Edwin T. Cooper,
Proctors for Healy Tibbitts Construction Company, Appellant, appearing specially below to move against the restraining order issued by the said District Court.